Restatement of Questions Presented

1. Was the Appellate Division* the highest court of New York in which a decision could be had within the meaning of 28 U.S.C. § 1257(2)?

2. Are appellants' challenges to the constitutionality of the Human Rights Law, N.Y. Exec. Law § 296.10 (McKinney, 1982) sufficiently substantial to warrant review by this Court?

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* This appeal is from orders of the Appellate Division dated June 1, 1981, and October 16, 1981, set forth in the Jurisdictional Statement at 4a and 3a respectively and not as stated by appellants in Jurisdictional Statement at 2, from the order of the New York Court of Appeals denying appellants' motion for leave to appeal. See 12 Moore's Federal Practice § 509.01 (2nd ed. 1982).

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No. 82-293

Supreme Court of the United States

October Term, 1982

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,
Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,
Appellees.

On Appeal from the Supreme Court of the State of New York, Appellate Division, Second Department

MOTION TO DISMISS

Appellee State Division of Human Rights moves pursuant to Rule 16.1(a) and (b) of the Revised Rules of this Court to dismiss this appeal bacause:

(1) The appeal is not within the Court's jurisdiction.

(2) Appellants do not raise any substantial federal questions.

Statutes Involved

1. 28 U.S.C. § 1257(2) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

2. The relevant provisions of the Human Rights Law* are set forth in the Jurisdictional Statement at 4-5.

3. N.Y. Civ Prac. Law § 5601(b)(1) (McKinney 1978) provides:

> . . . .
>
> (b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
>
> (1) from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States. . . .

Statement of the Case

Appellants are attempting to appeal to this Court from a denial by the New York Court of Appeals of a motion for leave to appeal.

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* Executive Law § 296.10 (McKinney 1982).

That order leaves undisturbed a decision of the Appellate Division which confirmed an order of the State Human Rights Appeal Board which had affirmed an order of the State Division of Human Rights.

The administrative orders sustained by the Appellate Division find that appellants had violated Section 296.10 of the Human Rights Law by terminating complainant Essie Morris for refusing to work on her Sabbath.

Essie Morris, a Seventh-day Adventist, was one of 100 nurses aides employed by appellants. When Morris was hired in 1967, she informed appellant Hospital that because she was an Adventist she would be unable to work on her Sabbath, which is from sundown Friday to sundown Saturday. Nurses aides are employed in the clinic, which is open only on weekdays from 8:00 a.m. to 4:00 p.m. This assignment would not have interfered with Morris's Sabbath observance. However, Morris was assigned to the hospital nurseries, which function around the clock seven days a week. There, nurses aides are assigned days off on a rotating basis.* For nine years, whenever Morris was scheduled to work on Friday nights, she found either of two employees to switch nights off with her.

In 1976, one of the two employees retired and the other became unavailable on Friday night. Morris was unable to find other employees willing to switch with her. When this happened, Morris offered to work six nights, every Saturday and Sunday night or any other night or day to make up the time so long as she could have her Sabbath off. She also requested a transfer to the clinic. Despite

* There is no union and no collective bargaining agreement.

her requests, Morris continued to be scheduled, on rotation, Friday night shifts. Each time she was scheduled for Friday night, she informed appellants that she could not report to work because of her Sabbath observance.

On August 27, 1976, Morris was given a warning notice concerning failure to report for work on Friday nights. On September 7, 1976, Morris was terminated for failure to work Friday, September 3, 1976.

The Division of Human Rights found appellants had discriminated against Morris and had violated the Human Rights Law § 296.10 by terminating her for refusing to work on her Sabbath. The Appellate Division affirmed the Division's finding. Appellants sought and were denied leave to appeal to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5602(a). Appellants did not invoke N.Y. Civ. Prac. Law § 5601(b)(1).

ARGUMENT

I

The Appeal Is Not Within the Court's Jurisdiction.

The Appellate Division was not the highest court in which a decision could be had within the meaning of 28 U.S.C. § 1257(2). Appellants could have appealed as of right to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5601(b)(1), see N.Y. Const. Art. VI § 3(b)(1) for decision of their constitutional claim. By overlooking or rejecting this option, appellants failed to obtain a decision from the State's highest court.

Appellants have failed to exhaust all the possibilities afforded by state procedure for review. See *Gorman* v. *Washington University*, 316 U.S. 98 (1942). The appeal must therefore be dismissed. See *Southern Electric Co.* v. *Stoddard*, 269 U.S. 186 (1925).

II

The Appeal Does Not Present a Substantial Federal Question.

Appellants raise three claims concerning the Sabbath observer provision of the Human Rights Law. None presents a substantial federal question.

A. *First Issue:* Facial validity under the Establishment Clause of the First Amendment of Section 296.10 of the Human Rights Law.

Appellants argue that Section 296.10 on its face violates the Establishment Clause. The argument fails to raise a substantial federal question. See *Rankins* v. *Commission on Professional Competence*, 444 U.S. 986 (1979),* dismissing an appeal from 24 Cal. 3d 167 (1979).

The California Supreme Court construed its constitutional prohibition against religious discrimination in employment as imposing on employers the duty of reasonable accommodation of employee absences for Sabbath observance and for religious holidays, unless to do so would cause the employer undue hardship. In reaching its decision, that Court, interpreting the prohibition as consistent with Sec-

* Brennan, Blackmun and Stevens, JJ., would have noted probable jurisdiction.

tion 701(j) of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e(j),* held the prohibition constitutional under the Establishment Clause of the First Amendment. In dismissing the appeal, this Court summarily upheld, under the Establishment Clause, the duty of reasonable accommodation imposed by the California Supreme Court and Title VII of the Civil Rights Act of 1964. See *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 453 (7th Cir. 1981), *cert. denied*, —— U.S. ——, 70 L. Ed. 2d 488 (1981).**

The duty imposed by Section 296.10 of the Human Rights Law closely resembles the duty imposed by Title VII and the California Supreme Court. Appellants have failed to demonstrate that the issue raised in this case is more deserving of plenary consideration than the issue dismissed summarily for want of a substantial federal question in *Rankins*.

B. *Second Issue:* Validity under the Establishment Clause of Section 296.10 of the Human Rights Law as applied.

Appellants argue that Section 296.10 as applied to them is unconstitutional. Although constitutional questions could have been raised if appellants had been compelled to incur substantial costs to accommodate Morris, "[T]he constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting).

* The relevant provisions of Title VII are set forth in the Jurisdictional Statement at 3.

** Brennan and Marshall, JJ., would have granted certiorari.

Essie Morris's Sabbath requirements could have been accommodated without even an exemption from a work rule. Appellant Hospital had nine years notice of Morris's Sabbath requirement during which it could have assigned her to the clinic to safeguard her Sabbath observance.

There would have been no need to vary uniform scheduling of shifts or to require other employees to take over Morris's shifts. The transfer would not have cost appellant Hospital any money and would not have caused any hardship to other employees. It would have avoided even the semblance of a constitutional confrontation.

C. *Third Issue:* Vulnerability of Section 296.10 of the Human Rights Law to challenge as void for vagueness.

Appellants argue that the language of Section 296.10 is so vague that it denies due process of law. This Court has recognized that, "[T]here are limitations in the English language with respect to being both specific and manageably brief. . . ." *CSC* v. *Letter Carriers,* 413 U.S. 548, 578-579 (1973).

The plain meaning of the statute, together with its legislative history and clear judicial interpretation of relevant language provide ample notice to employers of their duties under Section 296.10.

1. Sabbath Observance

No "theological debate"* is required to inform employers that the Sabbath observance of a Seventh-day

* Jurisdictional Statement at 20.

Adventist requires abstention from work from sundown Friday to sundown Saturday. It has been recognized and protected by the Supreme Court under the Constitution, see *Sherbert* v. *Verner*, 374 U.S. 398 (1963), as well as by the highest court in New York under Section 296.10. *Matter of Schweizer Aircraft Corp.* v. *State Division of Human Rights*, 48 N.Y.2d 294 (1979).

2. "Emergency"

Even though no definition of a word is set forth in a statute, it does not follow that the word is without a clear meaning. See *People* v. *Cruz*, 48 N.Y.2d 419, 427 (1979). Emergency is a term that "the ordinary person exercising ordinary common sense can sufficiently understand . . . ." *CSC* v. *Letter Carriers*, 413 U.S. at 579.

"Emergency" is a word of ordinary import which, since the Legislature did not indicate otherwise, is to be given its ordinary and usual meaning, N.Y. Statutes § 232 (McKinney 1971). It is defined as "a sudden unexpected happening; an unforeseen occurrence or condition . . ."* Black's Law Dictionary 469 (5th ed. 1979). And so it is understood by this Court: "We think of emergencies as suddenly arising and quickly passing," *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 39 (1940), and in New York: "[A]n apt term for 'a sudden or unexpected occasion for action, exigency; pressing necessity' Cent. Dict." *People* v. *Fagan*, 194 App. Div. 185, 193 (2d Dept. 1920).

Since "emergency" is a word with a commonly accepted meaning, it cannot be said to lack sufficient guidelines to

* Essie Morris testified that she could work on her Sabbath during an emergency. It was the regular scheduling on her Sabbath that violated her religious obligation.

satisfy the requirements of due process. See *People* v. *Cruz*, 48 N.Y.2d 419, 428 (1979).

3. "Indispensable"

The statute provides the employer with an exemption where the "personal presence" of the Sabbath observer "is indispensable to the orderly transaction of business." Section 296.10(b). The bill introducers stated that this exemption would "not apply to situations where another employee can temporarily fill in for the Sabbath observer." Memorandum of Bill Introducers, 1967 N.Y. Sess. Laws 1487 (McKinney).*

And in approving the bill, Governor Rockefeller stated: "The exception would operate only in the most unusual situations, where the performance of the particular job is essential and where no one other than the particular job holder can perform the job." Governor's Memorandum of Approval, 1967 N.Y. Sess. Laws 1538 (McKinney).

It is clear that appellants did not come within this exception since they required that Morris either work or find a substitute. Appellants' objection was not to a substitute, but to the duty to refrain from scheduling Morris on her Sabbath.

4. "Health or Safety"

There is another exception for any position dealing with health or safety where the person holding such position

* Section 296.10, adopted in 1967, applied only to public employment. 1967 N.Y. Laws ch. 667. In 1971, Section 296.10 was amended to expand its coverage to the private sector. 1971 N.Y. Laws ch. 674.

must be available for duty whenever needed. . . ." Section 296.10(c). In his Memorandum of Approval, Governor Rockefeller stated: "Positions involving public health or safety where the holder must be on call at any time . . . such as police or fire positions, would be excluded. . . ." 1967 N.Y. Sess. Laws 1538 (McKinney).

Essie Morris was not "on call." She was on a regular, although rotating, night schedule. It was the regular scheduling on Friday nights that Essie Morris could not comply with. Here again there could be no doubt that appellants in this instance were not within the health and safety exclusion of Section 296.10(c).

The employer's affirmative duty under the statute was clearly spelled out by the Court of Appeals: "[E]mployers must make good faith efforts to seek accommodation." *Matter of Schweizer Aircraft Corp.* v. *State Division of Human Rights*, 48 N.Y.2d 294 (1979). Appellants made no effort, and therefore cannot claim denial of due process. "No constitutional value is served by permitting persons who have avoided any possibility of attempting to ascertain how they may comply with a law to claim that their studied ignorance demonstrates that the law is impermissibly vague." *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 636 (1976) (Rehnquist, J., dissenting).

Conclusion

The Appeal Should Be Dismissed.

Dated: October 13, 1982

Respectfully submitted,

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